

STATE OF HAWAII

HAWAII LABOR RELATIONS BOARD

In the Matter of)	CASE NO. CE-01-500
)	
UNITED PUBLIC WORKERS, AFSCME,)	DECISION NO. 440
LOCAL 646, AFL-CIO,)	
)	FINDINGS OF FACT, CONCLUSIONS
Complainant,)	OF LAW, AND ORDER
)	
and)	
)	
FRANK J. DOYLE, Deputy Director, Depart-)	
ment of Environmental Services, City and)	
County of Honolulu; TIMOTHY E.)	
STEINBERGER, Director, Department of)	
Environmental Services, City and County of)	
Honolulu; CHERYL OKUMA-SEPE, Director,)	
Department of Human Resources, City and)	
County of Honolulu; and JEREMY HARRIS,)	
Mayor, City and County of Honolulu.)	
)	
Respondents.)	

FINDINGS OF FACT, CONCLUSIONS OF LAW, AND ORDER

On April 19, 2002 the UNITED PUBLIC WORKERS, AFSCME, LOCAL 646, AFL-CIO (UPW or Union) filed a prohibited practice complaint with the Hawaii Labor Relations Board (Board) against FRANK DOYLE (DOYLE), TIMOTHY E. STEINBERGER (STEINBERGER), CHERYL OKUMA-SEPE, and JEREMY HARRIS (HARRIS) (collectively City or Respondents) regarding an alleged agreement to restore and expand public refuse collection operations made in conjunction with the completion of phases of five (5), six (6), and seven (7) of automated refuse collection operations on Oahu. The complaint was prompted by a letter, dated April 10, 2002, allegedly repudiating the existence of the agreement.

At a prehearing conference held on May 20, 2002 the Board took administrative notice of "both the proceedings and the decision in Case No. CE-01-465." On June 6, 2002 the UPW filed a motion for summary judgment, which was taken under advisement following oral argument on June 18, 2002.

Hearings were held on July 2, 3, and 5, 2002 during which Gary Rodrigues (Rodrigues) and David Shiraishi (Shiraishi) were recalled as witnesses. On July 5, 2002 the Board heard final oral arguments.

The Board set August 15, 2002 as the deadline for simultaneous briefs from the parties, and September 16, 2002 for reply briefs to address any issue of jurisdiction (or other new issues) which may be raised by the City. On September 24, 2002, the Board requested the parties to file further memoranda on the question of whether any laws or regulations governing county privatization in any way limited or preempted the Board's subject matter or remedial jurisdiction in the proceeding. Said memoranda having been duly filed, the Board hereby issues the following decision and order.

FINDINGS OF FACT

1. The UPW is an employee organization which represents nonsupervisory blue collar employees in bargaining unit 01. The Union was certified by the Board's predecessor, the Hawaii Public Employment Relations Board, as the exclusive bargaining representative of Unit 01 on October 21, 1971.
2. DOYLE is the Deputy Director of the Department of Environmental Services, City and County of Honolulu, and as a representative of the Mayor is deemed to be a public employer within the meaning of HRS § 89-2.
3. STEINBERGER is the Director of the Department of Environmental Services, City and County of Honolulu, and as a representative of the Mayor is deemed to be a public employer within the meaning of HRS § 89-2.
4. OKUMA-SEPE is the Director of Human Resources, City and County of Honolulu and as a representative of the Mayor is deemed to be a public employer within the meaning of HRS § 89-2.
5. HARRIS is the Mayor of the City and County of Honolulu and a public employer within the meaning of HRS § 89-2.
6. Since on or about July 1, 1972 the UPW and the City and County of Honolulu have been parties to 13 successive multi-employer collective bargaining agreements covering Unit 01 employees.
7. Historically, refuse collection on Oahu has been governed by the Unit 01 agreement and where applicable, the "Policies and Procedures on Task Work for Refuse Collection," dated December 13, 1973, as amended, thereafter in various memoranda of agreements (MOAs) entered into by the parties, including but not limited to a March 2, 1998 MOA on "Automated Refuse Collection Operation" (March 2, 1998 Automated Refuse MOA or March 2, 1998 MOA).

8. Plans to modernize refuse operations on Oahu were initiated in the late 1980's by City officials who proposed to convert the manual to an automated refuse collection system.
9. At the operational level the proposed changes involved the elimination of as many as 70 manual routes and the reduction in the number of manual crews from 85 to 15 on the island.
10. The conversion would entail a reduction in crew size from three to one person potentially affecting a total of 140 positions.
11. Due to the significant impacts on the wages, hours, and other terms and conditions of employment of Unit 01 employees, both the employer and Union representatives recognized that the changes would require negotiations and mutual consent of the parties to the collective bargaining agreement. Accordingly, the parties agreed that automated refuse operations would not be implemented without UPW consent.
12. Initially the parties agreed to a "demonstration project" in 1991 to be implemented "in the Ewa Plain." The project was extended in 1993 to include additional areas (e.g., Pacific Palisades). The first of four phases of the new automated refuse collection process which began in 1994 proved to be extremely disruptive due to employee concerns over layoffs, transfers, and loss of jobs. Employees at the Pearl City baseyard engaged in a partial work stoppage to protest phase one of automated refuse operations.
13. The Union refused to agree to phases two through four of automated refuse collection until City negotiators agreed to convert all limited appointees to permanent status and to assure existing refuse employees that no layoffs, transfers, or other displacements would result.
14. On March 14, 1996, the same day phase three was being implemented, the Union issued a stern written opposition to further automation because of threats of employee displacement. The letter to the City stated in relevant portions as follows:

This is to advise you that the United Public Workers will not consider the addition of automated routes for the Honolulu baseyard in 1997 and the addition of automated routes to any other yard that will cause the displacement of any refuse collection employees, whether they are regular employees or LTA employees. (Emphasis added).

15. In 1996, HARRIS advised the Union that automated refuse collection would not result in transfers, layoffs or employee displacements. Based on HARRIS' reassurance, City officials confirmed in writing "that there will be no permanent displacements" in late 1996. The commitment satisfied the Union that phase four could be implemented in 1997.
16. On July 21, 1997 Jonathan Shimada (Shimada), then Director of Public Works, City and County of Honolulu, informed the Union of plans to implement phases five, six, and seven of automated refuse in the years 1998, 1999, and 2000, respectively, by converting more than 40 routes and resulting in displacements of between 45 to 68 current employees. The City's plan provided a detailed count of the "projected displacement" of employees baseyard by baseyard.
17. UPW State Director Rodrigues informed the City that the Union would not agree to implement the final three phases unless there were assurances given that no employees would be displaced and excess staffing would not result.
18. The Union's opposition prompted Shimada to transmit an offer dated December 3, 1997 which revised and reduced the number of new automated routes and proposed a completely new idea to address the projected "displacements" of 45 to 68 employees in the three remaining phases of automated refuse collection. The offer was specifically authorized by Mayor HARRIS.
19. In relevant portions the December 3, 1997 offer proposed a program to restore and expand public refuse operations as a means to avoid the earlier projected employee displacements with the implementation of phases five, six, and seven of automated refuse collection:

Table 4, attached, presents a program for implementation with no displacements in 1998 and 1999. We believe that the opportunities for competition contemplated for the year 2000 will allow for the completion of all remaining and future automated routes with no displacements. Cost estimates for those operations considered for expansion are enclosed for your information. We provide efficient service in residential multi-family frontloader collection (Table 1), convenience center hauling (Table 2), and bulky item collection (Table 3); the private sector still has an advantage in School/Community Recycling Program hauling.

We therefore propose that we finalize a memorandum of agreement which embodies the principle of no displacements and a commitment of mutual cooperation to effect efficiency in our operations so that we may compete with private haulers in those areas where we believe we can be successful.

20. The proposal was accompanied by a comparative analysis of public versus private refuse collection costs for residential multi-family frontloader collection services, convenience center hauling, bulky item collection, school community recycling program, and a Table 4 entitled "Placement of Displaced Employees," which was prepared by Shiraishi and cleared by DOYLE.
21. Table 4 provided a baseyard by baseyard breakdown of projected "displaced employees" of 17 to 23 employees in 1998, 13 to 22 employees in 1999, and 15 to 22 employees in 2000 (for the remaining phases five, six, and seven of automated refuse collection), and a "remarks" column which indicated that "no displacement" would occur in each of the three years "because" of the restoration of public refuse collections. The remarks section for 1998 indicated "No Displacement; Actual Retirements Higher Than Projected," for 1999 indicated "No Displacement; One Additional Frontloader Route and Convenience Center Operations," and for 2000 indicated, "No Displacement; Manpower will be adjusted by attrition or by the addition of two frontloader routes and by competing for: Military frontloader service contracts, Military residential automated collection contracts, State public school frontloader service contracts, Business frontloader service contracts."
22. The proposal prompted discussions over a wide range of issues between the UPW and City negotiators in five or six meetings which took place between December 3, 1997 and March 2, 1998. Initially questions were presented about what the City's proposal meant when it referred to "a commitment of mutual cooperation to effect efficiencies" because the cost projections, for example, on converting convenience centers indicated that government operations would cost slightly more. DOYLE informed Rodrigues that what the City meant was that significant efficiencies would be achieved through the conversion of manual to automated refuse collection, and that the projected savings to the City would be approximately \$6 million per year.
23. According to Shiraishi, cost savings was one of the two major concerns raised by the UPW (the other being avoidance of displacement). Shiraishi remembers that the Union was informed that the savings would amount to \$6 million per year by the conversion of manual to automated refuse collection. According to Rodrigues, the issue of efficiency focused on what would be achieved for the City in savings per year through the conversion to automated refuse collection,

and not an assessment of the cost effectiveness of each specific “operation” being proposed.

24. In these discussions DOYLE explained that the City proposal covered a wide range of “operations” including rolloff container services, front-end loader services, automated refuse collection, and bulky item collections. City representatives who were present recall that the proposed project areas would affect refuse collection at convenience centers, City agencies, shopping centers, military bases, public schools, condominiums, apartments, and residential units, and businesses.
25. DOYLE indicated that an amendment of the City ordinance would be needed to re-authorize the City to provide public refuse collection for state and federal agencies.
26. All employer representatives who were present in negotiations understood that by restoring public refuse collection and phasing out privatization the problem of “excess staffing” projected for the three remaining phases of automated refuse collection would be resolved without displacements.
27. According to Rodrigues, the Union would not have agreed to the final three phases of automated refuse conversion without the commitment from the City to restore and expand public refuse collection as specifically discussed prior to March 2, 1998.¹

¹In reliance on the City’s promise to restore and expand refuse collection services, the Union permitted 24 additional manual routes to be converted to automated routes in 1999 and 2000. The conversion of each route meant that the Union would lose two positions from the bargaining unit per crew and sustain a loss of 48 dues-paying members in the process.

The loss of 48 positions was to be offset by the addition of 12 positions to operate the

28. The essential terms of the agreement were referenced in the City's initial offer including the cost analysis sheets and Table 4 (Union's [Un.] Exs. 44-12 to 44-17 in Case No. CE-01-465), and incorporated (in part) into paragraphs "b," "r," and "t" of the automated refuse MOA dated March 2, 1998.
29. Details regarding the City's promised expansion of services were not incorporated into the MOA. Instead, section (b) of the document simply provided that no employee to be "placed or removed from the Refuse Division." It was the expectation of the Union, and promise of the City, that displacement would be avoided through the negotiated service expansion. The precise nature and timing of such expansion would, as has been the practice of the parties, be left to subsequently negotiated MOAs.
30. There was a mutual agreement on the "ultimate contractual objectives" desired by both sides, i.e., to improve the efficiency of refuse collection by completing the final phases of automated refuse collection and to convert privatized services to public operations in order to avoid displacement which would otherwise result through automation.
31. There was adequate consideration (in the reciprocal promises) for the agreement.

convenience centers, four additional positions to complete phases III and IV of the roll container service program, and at least four additional positions to staff two additional front end routes. In effect, the UPW had bargained for a net loss of 28 positions in phases five, six, and seven (of automated refuse conversion) to allow the City's operations to become more efficient through automation, so that it could restore and expand public refuse collection operations in the areas identified previously.

32. The un rebutted testimony of City officials in Case No. CE-01-465 indicates that a commitment to restore and expand public refuse collection services (by converting privatized services to government operations) was made to obtain the UPW's consent to the final three phases of automated refuse collection.²

²(Examination of Robin Chun-Carmichael)

Q. The Union has characterized -- let's go to 42-17 again. The last four lines in the "remarks" section.

A. What number? 44?

Q. The Union has characterized -- identified services there as services that would be converted or **reconverted to government service** as part of the deal? Was that part of the deal? I'll remind you your testimony was that you would make a good faith effort. Was that part of the deal?

A. It wasn't going to be converted. We were going to bid on these outside agencies to pick up their trash. We weren't picking up rubbish.

Q. What was the deal? Was the deal that you were going to make a good faith attempt to bring them in?

A. Yes.

Q. Or was the deal that you would bid on them?

A. We were going to attempt to try and bring these in-house. And that includes a bid, yes.

Q. So part of your understanding when the MOU of March was entered into was that the City would bid on those services, and presumably make a good faith attempt to win them?

A. Yes. (Emphasis added). (Tr. pp. 600-01 in Case No. CE-01-465).

* * *

Q. Let me back up. We talked earlier about the **conversion of City services that had been -- to government services.**

A. Yes.

Q. These City services were services that had been privatized?

A. Yes. Like the Convenience Centers, yes.

Q. So a commitment had been made to make best efforts to re -- to convert those privatized services to government services, provide --

A. Yes. (Emphasis added). (Tr. pp. 608-09 in Case No. CE-01-465).

(Examination of David Shiraishi)

Q. You testified that the privatization representations in negotiation -- implementation of the privatization changes that were discussed in negotiation were contingent on certain

33. The material and essential terms of the agreement were contained in written form in relevant portions of the City's initial letter of December 3, 1997 with the cost analysis sheets and Table 4,³ the automated refuse MOA dated

efficiencies being negotiated. What efficiencies were you talking about?

A. To ensure that if the City was going to be doing the work, that we would be competitive with whomever was doing the work.

Q. What efficiencies were you talking about?

A. We never discussed details. But that was mentioned that was important that we had to be competitive.

Q. Ms. Chun-Carmichael testified that a commitment was made to make best efforts, yeah, to put the City -- to have the City assume the privatized functions of Refuse collection functions within the City. And I believe you testified that you were aware of those representations?

A. Yes. (Emphasis added). (Tr. pp. 790-91 in Case No. CE-01-465).

³Table 4 indicates:

Placement of Displaced (of) (sic) Employees

1998

Employees displaced
0, 8-13, 0, 0, 9-11, 0,
0 [total of 17 to 24]

Remarks
No displacement
[because]* Actual Retirements
Higher Than Projected

1999

Employees displaced
3-5, 2-6, 0-2, 0, 8-9,
0, 0 [total of 13 to 22]

Remarks
No displacement
[because] One Additional Front-
loader Route and Convenience
Center Operations

2000

Employees displaced
2-4, 6-10, 0, 0, 7-8
0, 0 [total of 15 to 22]

Remarks
No displacement
[because] Manpower will be
adjusted by attrition or by the
addition of two frontloader routes
and by competing for:
Military frontloader service contracts
Military residential automated
collection contracts
State public school frontloader
service contracts

March 2, 1998,⁴ the 1999 changes to the City ordinance which permitted the City to restore and expand refuse collection services for State and federal government buildings, including competition with private haulers to contract services for public schools and military bases.⁵

Business frontloader service
contracts

*“Because” is added based on Shiraishi’s testimony as to what the remarks section of Table 4 meant. (Un. Ex. 44-17; Tr. pp. 180-82, 7/3/02 in Case No. CE-01-465).

⁴The 1998 Automated Refuse MOA incorporated in paragraph “a” the UPW’s commitment to phases five, six, and seven of automated refuse in paragraph “b” the City’s commitment in principle to restore and expand public refuse collections. The MOA states in relevant portions:

The parties agree to the following:

- a. The fifth, sixth, and seventh phases of the automated refuse collection operation shall consist of routes described in Exhibit A-4, A-5, and A-6. Exhibits A-5 and A-6 are general descriptions. The detailed description will be added to this MOA upon completion.
- b. The implementation of the fifth, sixth, and seventh phases shall not cause any employee in the refuse collection operation to be placed or removed from the Refuse Division.
* * *
- r. The convenience centers hauling operation will be added to the Refuse Disposal Operations in 1999. Refuse crew leaders and collectors shall be given first priority for selection of heavy truck driver, BC8, positions established to implement the convenience centers hauling operations after meeting the minimum qualification requirements of a heavy truck driver.
* * *
- t. One additional (1) Front Loader Route will be added in 1999. (Emphasis added). (Ex. 45 in Case No. CE-01-465)

⁵In 1999 the City Council amended the City ordinances to permit public refuse collection for state and federal agencies. (City’s Ex. OO; Tr. p. 28, 7/2/02 in Case No. CE-01-465). Section 9-3.3 of the Ordinance was amended as follows:

Ex. OO - Ordinance 99-32

Section 9-3.3 Service to government buildings.

The division may provide refuse collection services to buildings of the federal and state governments upon [being requested

to do so] request from the authorities responsible for such buildings. .
. . Such agreement shall be executed by the director of [finance]
budget and fiscal services, with the recommendation of the director,
on behalf of the city. [The division shall not provide refuse collection
services to buildings of the federal and state governments after
September 30, 1974, except that refuse collection from housing
projects of the Hawaii housing authority shall be governed by
Section 360-32 or by agreement between the city and the housing
authority.] (Emphasis added.)

34. It was also customary procedure for the parties to enter into MOAs to implement their basic understandings in connection with the resolution of refuse collection issues on Oahu. Automated refuse operations was agreed to and implemented over approximately eight years in phases through eight implementing MOAs.
35. After the March 2, 1998 MOA was entered into, a number of unanticipated disputes between the parties affected the timing (and in the case of the City the degree of performance) of their respective commitments under the agreement. In April 1998 a dispute over whether the City had agreed to a multi-employer agreement for Unit 01 employees arose and had to be submitted to the Board. (Un. Ex. 46 in Case No. CE-01-465). The dispute was resolved by an October 30, 1998 decision of the Board, and by a May 5, 1999 MOA which provided, inter alia, for the implementation of phases five and six of automated refuse collection on or about June 1, 1999, the implementation of phase seven of automated refuse collection on or about February 1, 2000, and for the implementation of convenience center conversion on or about February 1, 2000.
36. With phases five and six of automated refuse being implemented on June 1, 1999, the City added a front-end loader route, as required by paragraph “t” of the March 2, 1998 MOA, at the Pearl City baseyard. On September 14, 1999 the parties began discussing the plans and a schedule for the implementation of rolloff container services in four distinct phases. On April 18, 2000 the parties finalized an MOA on convenience center hauling operations which stated in Section 1 that the convenience center hauling conversion would be phase one (of four phases) of the rolloff container service operations.
37. In 1999 the City Council amended an ordinance to permit restoration and expansion of public refuse collection for state and federal governmental buildings. The change in the ordinance was necessary to permit the City to pursue refuse collection for the public schools and military bases.
38. In 1999 and 2000 the final three phases of automated refuse collection were fully implemented. The conversion resulted in the elimination of 70 manual routes which were replaced by automated routes. The changes produced an annual savings of \$6 million per year to the City and County of Honolulu, as had been contemplated and fully discussed during negotiations.
39. According to DOYLE the conversion of the convenience centers from private to public operations also resulted in cost savings to the City.

40. Further unanticipated delays occurred in the year 2000 and the year 2001 when City officials began insisting on a proposal to create a master pool on Oahu or to permanently transfer employees from Pearl City to other baseyards due to “excess staffing.” In a series of letters to the UPW, City representatives maintained that the excess staffing was a direct result of the final phase of automated refuse collection which had been implemented in 2000. The parties were unable to resolve the dispute over master pool and on February 5, 2001 the UPW filed a prohibited practice complaint in Case No. CE-01-465.
41. After several unsuccessful attempts at mediation, on August 16, 2001 STEINBERGER announced that 13 manual refuse collectors from the Pearl City baseyard would be involuntarily transferred to the Honolulu baseyard. On September 26, 2001 DOYLE advised the UPW that “the proposal to create an island-wide master pool” was being “withdrawn.” On October 29, 2001, the City modified the number of refuse workers being removed and placed from 13 to ten and on November 21, 2001, the ten employees were informed that the changes would become effective on December 10, 2001. Decision No. 432, Finding of Fact No. 49.
42. The dispute over transfers was presented to the Board at hearings held on November 28 and 29, 2001, and December 3, 4, 10, and 11, 2001. During the earlier proceeding, DOYLE testified that the City intended to make good on the prior commitments he gave to UPW regarding the restoration and expansion of public refuse collection. DOYLE, Shiraishi, and Robin Chun-Carmichael disclosed, however, that not much had been done by the City recently to perform on the commitments City officials made. The change from private to public operations in City agencies was not initiated as promised. The last contact with the military was in September 2000, and no bids had been presented by the City for military work. In spite of a number of mediation sessions the parties had not specifically worked on the practical aspects of implementing the two new front-end loader routes and all roll-off container services.
43. The Board rendered its decision on the transfer issue on March 15, 2002 in Decision No. 433 which is hereby incorporated by reference. The Board held pursuant to the collective bargaining agreement, any such transfers would require mutual consent.⁶

⁶The Board’s decision is currently on appeal by the City and the UPW to the Hawaii Supreme Court in S.C. No. 25442, Civ. No. 02-1-0929-04.

44. On March 18, 2002 the UPW requested Respondents for full performance of the commitments they made. On April 10, 2002 Respondents declined to proceed further as requested by the UPW.
45. In a letter dated April 10, 2002 STEINBERGER replied as follows:

This is in response to your letter dated March 18, 2002, in which you contend that the City entered into a binding agreement to expand public refuse collection service. The City disputes that any agreement was consummated which would require the City to attempt to expand its refuse collection services in light of the UPW's rejection of the City's authority and ability to place Refuse personnel where manpower is required.

The very exhibits which you attached to your March 18, 2002 letter expressly indicate that the City made a proposal to expand refuse collection services in order to avoid displacement of employees from the Refuse Division as a result of conversion to automated collection. This was to be accomplished by (1) converting the Convenient (sic) Center hauling from private to public operations, (2) providing for an additional Front-end loader route, and (3) competing for work with private haulers in other areas. See letter dated December 3, 1997 from Jonathan Shimada, former Director and Chief Engineer, Department of Public Works, Exhibit 44-12, Case No. CE-01-465.

Items (1) and (2) were completed. Item (3), competing for services, requires a commitment of mutual cooperation to effect efficiency in refuse operations. This proposal was rejected by the UPW when it rejected the City's attempts to place manual collectors displaced by the conversion to automated refuse, and by the UPW's absolute refusal to mutually cooperate with the City in order to effect efficiency in refuse operations.

The purpose of the City's proposal to pursue expansion of refuse services is not achieved in the absence of any cooperation by the Union to promote government efficiency of operations. The most obvious question is how such expanded services would be staffed. If the City is not allowed to place employees into the areas of expanded services, the City would be required to hire more employees in addition to the excess that

currently exists at Pearl City. This clearly is not what was intended by Dr. Shimada's proposal, and does not serve to promote efficiency of refuse operations. As you are aware, the City is bound by the terms of Hawaii Revised Statutes Section 89-9(d) to operate in an efficient manner. Accordingly, the City rejects any contention that it is obligated to pursue expansion of refuse collection services in light of the UPW's rejection of the entire proposal and its continued opposition to any ability by the City to place employees to achieve efficiency of operations.

DISCUSSION

Single family homes in the City and County of Honolulu are provided, at no charge, with large, sanitary, silent and virtually indestructible wheeled containers into which domestic refuse is deposited. Twice a week the containers are rolled to the curbside where an automated refuse truck mechanically grasps each container, deposits its contents into its bin and returns it to the curbside, leaving almost no spillage, smell or damage.

The automated refuse collection system was implemented in the 1990's. It replaced a system of manual collection where homeowner-purchased trash cans were manually emptied into the back of refuse trucks which compacted the trash. The manual system was noisier, sloppier and more costly to both the city and residents.

Municipal trash collection is provided at no charge only to civilian single-family residences. Most multifamily developments, businesses, public and private schools, churches, the military bases and certain City facilities, i.e., parks, must contract with private vendors for the removal of their trash.

The transition from manual to automated refuse collection systems was not seamless. The principal problem was a product of the very efficiency manifested in the change. Manual collection was conducted by crews of three, a driver and two collectors. The automated system requires only a driver. Thus the conversion provided the potential of displacing a substantial number of workers. Because these workers were subject to collective bargaining rights under the Bargaining Unit 01 collective bargaining agreement, both the City and Union acknowledged that, since the transition significantly affected terms and conditions of employment, the transition could not proceed unless mutual agreement was reached regarding the impact and effect upon the represented employees.

The dilemma of excess employees appeared to be resolved in March 1998 in a single impressive plan for labor-management innovation. Mayor HARRIS and DOYLE proposed to the Union that rather than limiting employment opportunities, the efficiencies

produced by automated collection be used to restore and expand City services. Essentially, DOYLE calculated that displacements could be avoided by proceeding in good faith to restore and expand City refuse collection services into the previously unserved areas. These would include multifamily developments, businesses, public and private schools, military facilities and privatized municipal facilities. Because automated refuse collection would save the City about \$6 million per year, and no significant increase in workforce would be required, the City concluded that these restored and expanded services could be provided to the taxpayers without increased costs.

What follows appears to have been a model of the joint decision-making envisioned by Chapter 89. In the course of negotiations, agents of the City unequivocally promised that displacements resulting from conversion to automated refuse would be avoided through the expansion of City services. The Union was thus assured of the security of its members and provided with the possibility of an expanded scope of influence as a result of the expanded scope of services. The City had evolved a plan to substantially increase services to its citizens by proceeding with automated refuse collection and restoring and expanding municipal services at no increase in costs or risks. In reliance on the promises of the City's agents, the Union therefore entered into an MOA which permitted the City to complete its conversion to automated refuse collection.

Details regarding the City's promised expansion of services were not incorporated into the MOA. Instead, section (b) of the document simply provided that no employee to be "placed or removed from the Refuse Division." It was the expectation of the Union, and promise of the City, that displacement would be avoided through the negotiated service expansion. The precise nature and timing of such expansion would, as has been the practice of the parties, be left to subsequently negotiated MOAs.

These anticipated subsequent MOAs were never negotiated. Shortly after the final automated refuse MOA, there was a substantial deterioration in the relationship between the parties. There followed antagonistic hard bargaining over the renewal of the applicable collective bargaining agreement. The parties engaged in litigation over the privatization of services. When apparent excesses or imbalances began to arise from automated refuse collection, the City proposed the establishment of a temporary master pool to provide for the daily placement of excess or underutilized manual refuse workers. Because of residual antagonism, the Union refused to enter into the master pool agreement and the City failed to enter into mediation on the subject. The City then announced plans to permanently transfer ten manual refuse workers from the Pearl City baseyard, where they were allegedly excess, to the Honolulu baseyard, where they were allegedly required to reduce overtime. The Union then filed a prohibited practice complaint with the Board in Case No. CE-01-465 alleging that the unilateral transfers would violate the collective bargaining agreement. The Board issued a decision that, pursuant to the collective bargaining agreement, any such transfers would require mutual consent.

In the course of the Board's proceedings in Case No. CE-01-465, the City's promises regarding the avoiding of displacement through the expansion of services were reiterated and affirmed. The Union thereafter sought to have the City proceed to satisfy these commitments. The City has refused to do so, and denied any contractual obligation to do so. The Union has thus filed the instant prohibited practice complaint to compel performance.

Obligation

The City attorneys have raised a plethora of technical legal objections to the acknowledgment of any obligation to proceed with the promised good faith expansion of municipal refuse collection services. These objections include res judicata, collateral estoppel, the parol evidence rule, the contractual zipper clause,⁷ the splitting of actions, and the applicable limitations period.

The Board concludes that these defenses do not dispose of the UPW's instant complaint. The foundation of those defenses related to judicial economy and a single adjudication of claims that were or should have been raised in a previous case (res judicata, collateral estoppel, and splitting of actions) do not preclude consideration on the merits. Essentially, the City argues that the Union's claim herein should have been adjudicated as a part of Case No. CE-01-465 because the interpretation of the same contract term (section (b) of the March 2, 1998 MOA) is at issue, and the alleged obligation to avoid displacement through the expansion of City refuse services arose within the factual disputes addressed within the context of that case.

The Board rule governing duplication of prohibited practice complaints before the Board is Hawaii Administrative Rules (HAR) § 12-42-42(f) which provides that, "Only one complaint shall issue against a party with respect to a single controversy."⁸ Thus, if both cases arise out of Aa single controversy," the instant case would be duplicative and barred. The Board concludes that the cases do not arise out of a single controversy.

⁷The City submits that the agreements at issue are fully integrated in accordance with paragraph u of the March 2, 1998 Automated Refuse MOA provides that "[m]odifications to this Memorandum of Agreement shall be made through negotiations pursuant to Section 1.05 of the Unit 01 Agreement."

⁸HRS ' 377-9 made applicable by HRS ' 89-14 provides in (b) in part as follows:

Only one complaint shall issue against a person with respect to a single controversy, but any complaint may be amended in the discretion of the board at any time prior to the issuance of a final order based thereon.

Case No. CE-01-465, as decided, arose out of an August 16, 2001 communication from STEINBERGER advising the UPW of the City's plans to involuntarily transfer 13 manual refuse workers from the Pearl City to Honolulu baseyard. The UPW alleged that the involuntary transfers were prohibited by the collective bargaining agreement, "Uku Pau" agreement, and March 2, 1998 Automated Refuse MOA.

The instant case arose out of an April 10, 2002 letter from STEINBERGER allegedly repudiating the City's contractual obligation to proceed with the restoration and expansion of municipal refuse collection services. The UPW alleges that repudiation violates obligations implicit in the March 2, 1998 Automated Refuse MOA. The cases thus deal with distinct alleged violations and, with a single exception, distinct contractual provisions. Even with respect to the alleged violation of the March 2, 1998 MOA, the Board in its decision in Case No. CE-01-465 neither interpreted nor relied upon the document in its disposition of the case. The Board can therefore find no basis to conclude that the complaints arose from a "single controversy."

Similarly, the instant complaint is not barred by the Board's 90-day limitations period.⁹ STEINBERGER's letter of April 10, 2002, was the initiating occurrence. The instant complaint was filed on April 19, 2002, well within the 90-day period.

The City's most colorable objection to the finding of an obligation is the parol evidence rule whereby extrinsic evidence may not be used to interpret contract language which is clear and unambiguous. State Farm Fire and Cas. Co. v. Pacific Rent-All, Inc., 90 Hawai'i 315, 978 P.2d 753 (1999); Pancakes of Hawai'i, Inc. v. Pomare Properties Corp., 85 Hawai'i 300, 944 P.2d 97 (Hawai'i App. 1997). At issue is the interpretation of section (b) of the March 2, 1998 MOA which provides:

The implementation of the fifth, sixth, and seventh phases shall not cause any employee in the refuse collection operation to be placed or removed from the Refuse Division.

The UPW argues that the provision should be interpreted to incorporate the City's pre-contract agreement¹⁰ to avoid displacement by restoring and expanding identified

⁹Pursuant to HRS ' 377-9(l) made applicable by HRS ' 89-14 and incorporated in the Board's rules of practice and procedure, Hawaii Administrative Rules (HAR) ' 12-42-42(a) provides:

A complaint that any public employer, public employee, or employee organization has engaged in any prohibited practice, pursuant to section 89-13, HRS, may be filed by a public employee, employee organization, public employer, or any party in interest or their representatives within ninety days of the alleged violation.

refuse collection services. The City argues that the language of the provision is sufficiently unambiguous so as to preclude any extrinsic evidence of intent or interpretation. In support, the City offers the applicability of the test propounded by the National Labor Relations Board in Sansla, Inc., 323 NLRB 107, 109, 156 LRRM 1094 (1997):

The well-established general rule is that where the parties to a contract have deliberately put their engagement in writing in such terms as import a legal obligation without any uncertainty as to the objective or extent of such engagement, it is conclusively presumed that the entire engagement of the parties, and the extent and manner of their undertaking, have been reduced to writing, and all parole evidence of prior or contemporaneous conversations or declarations tending to substitute a new and different contract from the one evidence by the writing is incompetent.

Sansla, Id., citing 30 Am.Jur.2d § 1016 (1967) as quoted in the City’s post hearing brief at 11. (Emphasis added). The Board finds this to be an appropriate statement of the general rule but further notes its applicability depends upon language “without any uncertainty as to the objective or extent of such engagement.”

The language of section (b), contained in the March 2, 1998 MOA, is certain insofar as it prohibits the City from displacing refuse workers as a result of implementing the fifth, sixth and seventh phases of the automated refuse collection operation. It is uncontroverted that it was a principal objective of the Union to avoid the displacement of workers. What is not clear within the four corners of the Automated Refuse MOA, is the extent of the obligation insofar as it is silent on how this “no displacement” commitment was to be accomplished. Therefore the Board concludes that section (b) of the March 2, 1998 Automated Refuse MOA is ambiguous.

To resolve the ambiguity, the Board relies upon the undisputed testimony of City officials that unequivocally evidence a commitment by the City to avoid displacements by proceeding in good faith to attempt to restore and expand municipal refuse collection services, consistent with the proposed offer initially made by then Director of Public Works Shimada.

On December 3, 1997, Shimada transmitted an offer with a completely new idea to address the projected “displacements” of 45 to 68 employees by converting more than 40 routes in the three remaining phases of automated refuse collection from manual to

¹⁰The UPW offers quasi-estoppel, promissory estoppel, and enforceable pre-contract obligation theories as alternative foundations for imposition of an obligation.

automated. The offer was specifically authorized by Mayor HARRIS. Hence, the Board finds that the City proposed a means by which the “no displacements” objective was to be accomplished.

In relevant portions, the December 3, 1997 offer proposed a program to restore and expand public refuse operations as a means to avoid the earlier projected employee displacements with the implementation of phases five, six, and seven of automated refuse collection:

Table 4, attached, presents a program for implementation with no displacements in 1998 and 1999. We believe that the opportunities for competition contemplated for the year 2000 will allow for the completion of all remaining and future automated routes with no displacements. Cost estimates for those operations considered for expansion are enclosed for your information. We provide efficient service in residential multi-family frontloader collection (Table 1), convenience center hauling (Table 2), and bulky item collection (Table 3); the private sector still has an advantage in School/Community Recycling Program hauling.

We therefore propose that we finalize a memorandum of agreement which embodies the principle of no displacements and a commitment of mutual cooperation to effect efficiency in our operations so that we may compete with private haulers in those areas where we believe we can be successful. (Emphasis added.)

The essential terms of the agreement were referenced in the City’s initial offer including the cost analysis sheets and Table 4, and incorporated (in part) into paragraphs “b,” “r” (to add convenience centers hauling operation in 1999) and “t”(to add one front-loader route in 1999) of the automated refuse MOA, dated March 2, 1998.

Nowhere in the automated refuse MOA is there language incorporating the City’s commitment to restore and expand services specifically as outlined in Table 4, i.e., to avoid displacements by adjusting manpower “by the addition of two frontloader routes and by competing for: Military frontloader service contracts, Military residential automated collection contracts [and] State public school frontloader service contracts, business frontloader contracts.” Nevertheless, in 1999, the City Council amended an ordinance to permit restoration and expansion of public refuse collection for state and federal governmental buildings. The changes were needed so that the City could compete for service contracts in the public schools and military bases.

Based on the City's offer to achieve its "no displacements" objective as proposed by Shimada, it would be unreasonable to presume that the City would agree to retain a surplus of manual refuse workers resulting from the conversion of more than 40 routes in the three final phases of automated refuse collection, while making no plan or commitment for their productive use. Such a commitment is articulated by Shimada when he proposed to finalize the MOA that "embodies the principle of no displacements and a commitment of mutual cooperation to effect efficiency in our operations so that we may compete with private haulers in those areas where we believe we can be successful."

We conclude that the City would not contract to waste public resources by promising to retain non-productive workers. Based on the testimony of OKUMA-SEPE, Shiraishi, DOYLE, and Chun-Carmichael, the City made a commitment to avoid displacements as well as a surplus of manual refuse workers by proceeding in good faith to restore collection services for the City which had been privatized, expand services to businesses, condominiums, and churches, and compete with private haulers to contract services for military bases and public schools. This is the City's obligation to proceed pursuant to the automated refuse MOA.

Even if the MOA could not be so interpreted, the "no displacements" obligation would exist by virtue of equitable or promissory estoppel. In exchange for the ARCO agreement which included implementation of final phases five, six, and seven, the City agreed to the principle of "no displacement" by committing to restore and expand refuse collection services. There was a mutual agreement on the "ultimate contractual objectives" desired by both sides, i.e., to improve the efficiency of refuse collection by completing the final phases of automated refuse collection and to convert privatized services to public operations in order to avoid displacement which would otherwise result through automation. According to Rodrigues, the Union would not have agreed to the final three phases of automated refuse conversion without the commitment from the City to restore and expand public refuse collection as specifically discussed prior to March 2, 1998. These promises were relied upon by the Union to their detriment and to the City's benefit. Consequently, the City should be estopped from denying its obligation to restore and expand public refuse collection.

Irrespective of which theory is applied, the bottom line remains the same. City officials have testified that their promises were part of the "deal." They testified to an intention to carry out the bargain and an understanding that they were contractually obliged to do so. The Union's unequivocal and un rebutted testimony evidence both acceptance and reliance. In Ariyoshi v. Hawaii Public Employee Relations Board, 5 Haw.App. 533, 704 P.2d 917 (1985), the Hawaii Intermediate Court of Appeals reversed an order of the Board's predecessor because the order was "in fact disruptive of public employer-employee relations under the contract and not in concert with the policy and goals of collective bargaining in public employment as proclaimed in H.R.S. § 89-1" (footnote omitted), 5 Haw.App. at 543. The Board concludes that the failure to impose, on the grounds of legal niceties, otherwise

admitted contractual obligations would similarly be disruptive of public employer-employee relations and would not be in concert with the policy and goals embodied in Chapter 89. See, N.L.R.B. v. Donkin's Inn, Inc., 532 F.2d 138, 141 (9th Cir. 1976) (in “the context of labor disputes. . .the technical question of whether a contract was accepted in the traditional sense is perhaps less vital than it otherwise would be. Rather, a more crucial inquiry is whether the two sides have reached an ‘agreement,’ even though that agreement might fall short of the technical requirements of an accepted contract.”)

Repudiation and Enforcement

The UPW claims that by its letter of April 10, 2002, in which the City “rejects any contention that it is obligated to pursue expansion of refuse collection services. . .,” the City repudiated its agreement and thereby wilfully breached their duty to bargain in good faith and violated the collective bargaining agreement. They seek relief for these alleged violations of HRS §§ 89-13(a)(1), (5), (7), and (8).¹¹

¹¹HRS ' 89-13(a) provides, in part:

It shall be a prohibited practice for a public employer or its designated representative wilfully to:

- (1) Interfere, restrain, or coerce any employee in the exercise of any right guaranteed under this chapter;
* * *
- (5) Refuse to bargain collectively in good faith with the exclusive representative as required in section 89-9;
* * *
- (7) Refuse or fail to comply with any provision of this chapter;
- (8) Violate the terms of a collective bargaining

agreement;

Having found there to have been a contractual agreement incorporated into the March 2, 1998 MOA to avoid excess staff through expansion of services, it might certainly appear that the City's rejection of any obligation to pursue expansion would violate their contractual obligations. But the City's rejection is not a naked one. Its justification is articulated in the final paragraph of the STEINBERGER letter:

The purpose of the City's proposal to pursue expansion of refuse services is not achieved in the absence of any cooperation by the Union to promote government efficiency in operations. The most obvious question is how such expanded services would be staffed. If the City is not allowed to place employees into the areas of expanded services, the City would be required to hire more employees in addition to the excess that currently exists at Pearl City. This clearly is not what was intended by Dr. Shimada's proposal, and does not serve to promote efficiency of refuse operations. As you are aware, the City is bound by the terms of Hawaii Revised Statutes Section 89-9(d) to operate in an efficient manner. Accordingly, the City rejects any contention that it is obligated to pursue expansion of refuse collection services in light of the UPW's rejection of the entire proposal and its continued opposition to any ability by the City to place employees to achieve efficiency of operations.

Thus, the City argues that there is simply no point in proceeding with the restoration and expansion of services because the purpose of any such expansion, the placement of surplus workers resulting from automated refuse collection, had been defeated by the UPW's making such placements impossible. The Board understands this conduct to reference the UPW's prevailing in Case No. CE-01-465 in which the Board found that the City was contractually barred from unilaterally transferring manual refuse workers from one baseyard to another without the Union's consent and after negotiating the impact of said transfers.

The City denies its obligation to restore and expand refuse collection services on a theory akin to the doctrine of "frustration." This defense is generally described as follows:

§666. Frustration of purpose or object of contract; commercial frustration.

In instances where performance had not become impossible, but the achievement of the objective or purpose of the contract was frustrated because of changed conditions

supervening during the term of the contract, the defensive doctrine applied has variously been designated “frustration” of the purpose or object of the contract or “commercial frustration.” The essential elements of the defense of frustration of purpose are frustration of the principal purpose of the contract, that the frustration is substantial, and that the non-occurrence of the frustrating event or occurrence was a basic assumption on which the contract was made. Accordingly, it has been held that an event which substantially frustrates the objects contemplated by the parties when they made the contract excuses nonperformance of the contract. In such a case it is sometimes said that the foundation of the contract is gone. However, relief will not be granted where the party claiming the benefit of the doctrine deliberately caused the frustration of purpose.

17A Am.Jur.2d § 666 (1991) (footnotes omitted).

The Board concludes that the doctrine is applicable and that the requisite elements are satisfied. The purpose of the agreement was to avoid a surplus of refuse workers through their placement in the restored and expanded services. This purpose was frustrated by the Board’s interpretation of applicable contract provisions in Case No. CE-01-465 prohibiting the unilateral transfer of manual refuse workers. The Board’s decision was original and unprecedented and consequently not anticipated by the parties at the time of contract. Accordingly, nonperformance is excused under the present circumstances and for so long as the doctrine of frustration applies.

The Board acknowledges that the circumstances that currently frustrate the objective of the agreement may be removed. This may be by a reversal of the Board’s decision by the Hawaii Supreme Court or by a negotiated agreement between the parties which removes the impediments to the transfer of excess manual refuse collection workers to positions resulting from a restoration and expansion of municipal services. In the event of either occurrence, contractual obligations to restore City collection services which had been privatized, expand services to businesses, condominiums and churches, and compete with private haulers to contract services for military bases and public schools would again attach. Accordingly, the instant complaint is dismissed without prejudice.

CONCLUSIONS OF LAW

1. The Board has jurisdiction over the instant complaint pursuant to HRS §§ 89-5 and 89-14.

2. The employer commits a prohibited practice in violation of HRS § 89-13(a)(1) when it wilfully interferes, restrains, or coerces any employee in the exercise of any right guaranteed under Chapter 89.
3. The employer commits a prohibited practice in violation of HRS § 89-13(a)(2) when it wilfully refuses to bargain collectively in good faith with the exclusive representative as required in HRS § 89-9.
4. The employer commits a prohibited practice in violation of HRS § 89-13(a)(7) when it wilfully refuses or fails to comply with any provision of Chapter 89.
5. The employer commits a prohibited practice in violation of HRS § 89-13(a)(8) when it wilfully violates the terms of a collective bargaining agreement.
6. Hawaii Administrative Rules (HAR) § 12-42-42(f) provides that, “Only one complaint shall issue against a party with respect to a single controversy.”
7. The Board concludes that the instant case and Case No. CE-01-465 do not arise out of a single controversy and therefore is not barred by HRS § 12-42-42(f). Case No. CE-01-465 arose out of an August 16, 2001 communication from STEINBERGER advising the UPW of the City’s plans to involuntarily transfer 13 manual refuse workers from the Pearl City to Honolulu baseyard. The UPW alleged that the involuntary transfers were prohibited by the collective bargaining agreement, “Uku Pau” agreement, and March 2, 1998 Automated Refuse MOA. The instant case arises out of an April 10, 2002 letter from STEINBERGER allegedly repudiating the City’s contractual obligation to proceed with the restoration and expansion of municipal refuse collection services. The UPW alleges that repudiation violates obligations implicit in the March 2, 1998 Automated Refuse MOA. The cases deal with distinct alleged violations and, with a single exception, distinct contractual provisions.
8. The instant complaint, filed on April 19, 2002, was timely filed within 90 days of STEINBERGER’s April 10, 2002 letter.
9. The Board concludes that section (b) of the March 2, 1998 Automated Refuse MOA is ambiguous in that the extent of the obligation not to displace refuse workers as a result of implementing phases five, six and seven is uncertain. However, based on the testimony of OKUMA-SEPE, Shiraishi, DOYLE, and Chun-Carmichael, the City made a commitment to avoid displacements as well as a surplus of manual refuse workers by proceeding in good faith to restore collection services for the City which had been privatized, expand services to businesses, condominiums, and churches, and compete with private haulers to contract services for military bases and public schools. This is the City’s

obligation to proceed pursuant to the automated refuse MOA. The Board concludes that this resolves the ambiguity of the contract language and the City is obligated to proceed pursuant to the MOA.

10. Notwithstanding the foregoing, the City's obligation also exists by virtue of equitable or promissory estoppel. Promises were made by the City, they were relied upon the Union to their detriment and the City's benefit, and thus, the City would consequently be estopped from denying its obligation.
11. In instances where performance had not become impossible, but the achievement of the objective or purpose of the contract was frustrated because of changed conditions supervening during the term of the contract, the defensive doctrine applied has variously been designated "frustration" of the purpose or object of the contract or "commercial frustration." The essential elements of the defense of frustration of purpose are frustration of the principal purpose of the contract, that the frustration is substantial, and that the nonoccurrence of the frustrating event or occurrence was a basic assumption on which the contract was made.
12. The Board concludes that the doctrine of frustration of the purpose or the object of the contract is applicable and that the requisite elements are satisfied. The purpose of the "no displacements" obligation was to avoid a surplus of refuse workers through their placement in the restoration and expansion of refuse services which have been privatized. This purpose was frustrated by the Board's interpretation of applicable contract provisions in Case No. CE-01-465 prohibiting the unilateral permanent transfer of manual refuse workers from one baseyard to another without UPW's consent and negotiation over its impact. Accordingly, nonperformance by the City is excused under the present circumstances and for so long as the doctrine of frustration applies.
13. The circumstances that currently frustrate the objective of the agreement may be removed by a reversal of the Board's decision by the Hawaii Supreme Court in Case No. CE-01-465 or by a negotiated agreement between the parties to remove the impediments to the transfer of excess manual refuse collection workers to positions resulting from a restoration or expansion of municipal services. In the event of either occurrence, contractual obligations would again attach.

ORDER

The Board hereby dismisses the instant complaint, without prejudice.

UNITED PUBLIC WORKERS, AFSCME, LOCAL 646, AFL-CIO v. FRANK J. DOYLE, et al.
CASE NO. CE-01-500
DECISION NO. 440
FINDINGS OF FACT, CONCLUSIONS OF LAW, AND ORDER

DATED: Honolulu, Hawaii, February 11, 2003.

HAWAII LABOR RELATIONS BOARD

/s/BRIAN K. NAKAMURA
BRIAN K. NAKAMURA, Chair

/s/CHESTER C. KUNITAKE
CHESTER C. KUNITAKE, Member

/s/KATHLEEN RACUYA-MARKRICH
KATHLEEN RACUYA-MARKRICH, Member

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